**U.S. Department of Homeland Security**
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

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DATE: OCT 2 5 2012 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

**DISCUSSION**: The employment-based immigrant visa petition was denied by the Director, Nebraskia Service Center (Director). The petitioner filed an appeal, which was dismissed by the Chief, Administrative Appeals Office (AAO). The petition is now before the AAO on a motion to reopen and a motion to reconsider. The motion(s) will be dismissed.

The petitioner, a manufacturer of transportation and telecommunications equipment, filed its Immigrant Petition for Alien Worker, Form I-140, on August 17, 2007. It seeks to permanently employ the beneficiary in the United States as a general manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This section of the Act provides for immigrant classification to members of the professions holding advanced degrees whose services are sought by employers in the United States. "Advanced degree" is defined in the regulation at 8 C.F.R. § 204.5(k)(2) as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

As required by statute, the petition was accompanied by an Application for Permanent Employment Certification, ETA Form 9089, which had been filed with the United States Department of Labor (DOL) on June 12, 2007 (the priority date) and was certified by the DOL on June 18, 2007.

The Director denied the petition on August 28, 2008, on the ground that the petitioner did not establish its continuing ability to pay the proffered wage -- $109,990.00 per year – from the priority date up to the present. The documentation of record, the Director noted, showed that the beneficiary was paid by [redacted] a separate entity from the petitioner.

A timely appeal (Form I-290B) and additional evidence was filed on September 30, 2008. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On March 21, 2011, the AAO issued a Notice of Intent to Deny (NOID) the petition and dismiss the appeal. While mentioning the Director's ground for denying the appeal, the AAO indicated that another issue in the case was whether the petitioner would be the beneficiary's employer. In the AAO's view, it appeared that [redacted] the petitioner's parent company, would be the beneficiary's actual employer. The petitioner responded to the NOID by submitting a brief from counsel and additional documentation.

On June 27, 2011, the AAO issued a comprehensive decision dismissing the appeal. The AAO reviewed the documentation of record and found that it established the continuing ability of the petitioner to pay the proffered wage from the priority date onward. However, the AAO also found that the petitioner failed to establish that it would be the beneficiary's employer. The AAO reviewed the documentation of record that described the beneficiary's relationship to [redacted]

[redacted] analyzed the elements of control exercised by the respective companies in accordance with the case law in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), and *Clackamus Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), and determined that the essential elements of control over the beneficiary were exercised by [redacted] not [redacted] The AAO concluded, therefore, that [redacted] was the beneficiary's actual employer. Since [redacted] was not the beneficiary's actual employer, it was not authorized to file the instant petition on his behalf. Accordingly, its appeal was dismissed.

On July 26, 2011, the petitioner filed another Form I-290B, which was identified as a motion to reopen and a motion to reconsider. The requirements for a motion to reopen are set forth in the regulation at 8 C.F.R. § 103.5(a)(2):

> A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The requirements for a motion to reconsider are set forth at 8 C.F.R. § 103.5(a)(3):

> A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

As further provided in 8 C.F.R. § 103.5(a)(4):

> A motion that does not meet applicable requirements shall be dismissed.

In a brief accompanying the motion counsel for the petitioner claimed that both [redacted] and the beneficiary had been "irreparably harmed" by the ineffective assistance of counsel provided by the petitioner's two previous attorneys. According to present counsel, previous counsel incorrectly advised that the beneficiary – who apparently began working for [redacted] in H-1B status in 2004 – could lawfully remain in the United States despite the denial of his Form I-485 application to adjust status. As a result of this advice, counsel indicates that the beneficiary is now subject to a 10-year bar from re-entering the United States should he depart the country. Counsel asserts that the previous attorneys neglected to advise that a new Form I-140 petition could have been filed by the *bona fide* petitioner, and that the beneficiary could have filed a new Form I-485 application, which would have preserved his right to stay in the United States. In counsel's view, the AAO should utilize its "executive discretion" to remedy the situation for the petitioner and the beneficiary. Counsel cites facts and figures of [redacted] business operations in the United States, and submits a series of letters from [redacted] its subsidiaries, and other businesses in the Upper Midwest attesting to the beneficiary's valuable contributions to [redacted] and the regional economy as a whole. Thus, the petitioner's motion seeks relief in the form of equitable estoppel.

The AAO has no authority to address an equitable estoppel claim. Like the Board of Immigration Appeals, the AAO has no authority to apply the doctrine of equitable estoppel so as to preclude a component part of USCIS from performing a lawful action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente,* 20 I&N Dec. 335, 338 (BIA 1991). The AAO's jurisdiction is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security (DHS). *See* DHS Delegation No. 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 2.1 (2004). The AAO's jurisdiction is also limited to those matters described at 8 C.F.R. § 103.1(f)(3)(iii) (as in effect on February 28, 2003).

The petitioner has presented no new facts or documentation, as required in a motion to reopen, to refute the AAO's prior determination that the petitioner, based on the evidence of record, would not be the beneficiary's actual employer. Furthermore, the petitioner has not presented any persuasive argument and/or pertinent precedent decisions showing that the AAO's initial decision was based on an incorrect application of law or USCIS policy, as required in a motion to reconsider. Therefore, the petitioner's pending motion does not meet the requirements of a motion to reopen under 8 C.F.R. § 103.5(a)(2) or a motion to reconsider under 8 C.F.R. § 103.5(a)(3).

Motions for the reopening or reconsideration of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *See INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110. With the current motion(s), the movant has not met that burden. Therefore, the motion(s) will be dismissed in accordance with 8 C.F.R. § 103.5(a)(4).

**ORDER**: The motion to reopen and motion to reconsider are dismissed. The AAO's decision of June 27, 2011 is affirmed.